

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

**IGT d/b/a INTERNATIONAL GAME
TECHNOLOGY**

and

Case 28-CA-166915

**INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL UNION 501, AFL-CIO**

MOTION TO PERMIT TESTIMONY BY VIDEO CONFERENCE

Pursuant to Section 102.24 of the Board's Rules and Regulations, Series 8, as amended, Counsel for the General Counsel moves for permission to introduce witness testimony by means of video conferencing technology. Specifically, the General Counsel requests permission to have witness Julie Doti testify via video conference to avoid the unnecessary cost to the General Counsel of making her available to provide in-person testimony during the hearing scheduled for April 12, 2016,¹ in Las Vegas, Nevada. Doti currently lives in Round Rock, Texas, which is approximately 100 miles from San Antonio, Texas. The General Counsel is attempting to arrange the video conference from its Region 16 Resident Office in San Antonio, Texas.²

I. PROCEDURAL AND FACTUAL BACKGROUND

The issues to be decided in this case are whether IGT d/b/a International Game Technology (Respondent) violated Section 8(a)(1) of the Act by maintaining an overly-broad Non-Disparagement provision in its Separation Agreement and General Release (Separation

¹ All dates herein refer to 2016 unless otherwise noted.

² Counsel for the General Counsel has been advised that use of the San Antonio Resident Office's videoconferencing equipment is possible and, upon the granting of this motion, will make further logistical arrangements in consultation with the Judge and the parties.

Agreement). Respondent denies the allegation and offers various affirmative defenses regarding the maintenance of this rule with employees. Doti is Respondent's Human Resources Director and her name and title are listed at the signature line of the Termination Letter that was issued to employee Jorge Cortez Rivas on November 4, 2015, along with the attached Separation Agreement which contains the overly-broad provision. Doti will be called to present testimony in support of paragraph 5 of the Complaint.

II. ARGUMENT

Federal Rule of Civil Procedure 43 provides that a court "may for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location." Under this rule, the Board's Administrative Law Judges have permitted such testimony through means such as video conferencing. See, e.g., *M V.M., Inc.*, 352 NLRB 1165, 1165 fn. 1 (2008) (ALJ noting that the record was re-opened and evidence admitted through video conference).

In order to encourage the use of such technology, the General Counsel instituted a pilot program that focused at first on representation case hearings. See Memorandum OM 11-42 (CH), at 1 (March 30, 2011). The program has since been explicitly extended to unfair labor practice hearings where "good cause" is shown. See *Id.* at 2. Factors relevant to determining "good cause" are:

- the availability of the participants and proximity of the participants to the hearing site;
- the potential of using video testimony versus travel costs;
- the types of issues the testimony addresses;
- the anticipated length and scope of the hearing; and
- the positions of the parties and the ALJ.

Id. Other relevant logistical factors include the availability of video conferencing technology, the number and type of documents to be introduced by way of the testimony, the number of witnesses and anticipated length of testimony, and whether such documents can be made available to the witness when testimony is taken. *Id.*; see also NLRB Division of Judges Bench Book, § 12-400 (October 2015) (discussing specific factors considered by additional authorities in approving testimony by video conference, earlier OM Memorandum on the subject, and the availability of videoconferencing equipment at all regional offices).

In this case, virtually all of the relevant factors support granting the General Counsel's Motion to permit Doti's testimony by video conference or similar technology. Due to her residency in Round Rock, Texas, Doti will be nowhere near the hearing site on the date of the hearing and subpoena enforcement is not financially feasible in this case. However, she will be able to provide testimony by video conference or other means of video communication from the General Counsel's Region 16 Resident Office in San Antonio, Texas. If Doti is not permitted to testify via videoconference or other means of video communication, the General Counsel will incur significant travel costs to facilitate her testimony in Las Vegas, Nevada.

Doti's testimony will be limited to Respondent's maintenance of the overly-broad Non-Disparagement provision in its Separation Agreement since about June 30, 2015 and its issuance to employees of Respondent. All of the exhibits to which Respondent will testify, will be provided at the Las Vegas hearing location on the date of her testimony, just as if she was testifying in person at the hearing.

Opponents to permitting testimony via video conference contend that such testimony precludes the ALJ and other parties from fully perceiving the witness's demeanor and impedes the ALJ's ability to make a credibility assessment. Indeed, this is the very

rationale that led the Board to disapprove of taking witness testimony by telephone in *Westside Painting, Inc.*, 328 NLRB 796, 796-97 (1999). However, unlike testimony by telephone, video conferencing technology permits all parties to view the witness during the testimony, just as they would if the witness were sitting in-person behind the witness stand. Thus, the witness can be observed by video during the testimony, and the ALJ would still be able to make credibility determinations based on the witness' demeanor.

The General Counsel has demonstrated above that good cause exists, in light of the compelling circumstances, to permit Doti to testify by contemporaneous video transmission from a different location.³

III. CONCLUSION

Doti's testimony is essential to proving that Respondent maintained the overly-broad Non-Disparagement rule and issued it to employees. For the reasons set forth above, permitting testimony by video conferencing is the only certain means of securing Doti's testimony. Therefore, the General Counsel requests that its Motion to Permit Testimony by Video Conference be GRANTED and that an order be issued directing Doti to report to a location to be determined in San Antonio, Texas on April 12, 2016, and on consecutive days thereafter.

³ Both Respondent and Counsel for the General Counsel are in agreement on helping to coordinate Doti 's testimony via videoconference.

Dated at Albuquerque, New Mexico this 5th day of April 2016.

/s/ Cristobal A. Munoz

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CERTIFICATE OF SERVICE

I hereby certify that a copy of MOTION TO PERMIT TESTIMONY BY VIDEO CONFERENCE in IGT d/b/a INTERNATIONAL GAME TECHNOLOGY, Case 28-CA-166915 was served by E-Gov, E-Filing, and E-Mail on this 5th day of April on the following:

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